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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN G. SPRECHER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STUART J. YOUNG
Counsel of Record
Attorney for Petitioner
65-08 Austin Street
Rego Park, New York 11374
(718) 459-6601

69pp

QUESTIONS PRESENTED

1. Whether the standard enunciated in *Celotex Corporation v. Catrett*, 106 S. Ct. 2548 (1986) should apply to a 2255 petition, resulting in a reversal of a conviction, if the government fails to deny allegations presented in the petition such as *Giglio* and *Brady* violations which, if proven, would mandate reversal. If not, whether at a minimum a hearing is required where the government fails to deny such allegations.

2. Whether post-trial discovery of the debilitating psychotic, mental condition of the federal government's chief witness highly relevant to his credibility mandates a new trial under all circumstances, and especially under circumstances where the government knew or should have known of this mental condition and failed to disclose it to the defendant at trial. At a minimum is a hearing required on this issue?

3. Whether an "actual conflict" exists when an attorney fails to inform his client, a defendant in a federal criminal action, that during the pendency of his pre-trial representation of his client, the attorney was in violation of his federal probation and vulnerable to summary arrest and imprisonment.

4. Whether a federal criminal defendant should be deemed to have waived his constitutional right to testify in his own behalf in a case in which he yields to his trial counsel's threats to resign if his client insisted on testifying, made for reasons unrelated to any concern of his client's perjury.

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BENJAMIN G. SPRECHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Dr. Benjamin G. Sprecher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1-A5) is unreported. The opinion of the district court (App., *infra* A6-A27) also is unreported.

JURISDICTION

The court of appeals entered its judgment on March 12, 1998 (App., *infra*, A1). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, "***nor shall any person*** be deprived of life, liberty, or property, without due process of law."

Amendment VI to the Constitution of the United States provides, in relevant part, "[I]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence."

28 U.S.C. Section 2255 provides, in relevant part, the following:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States *** or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence ***.

STATEMENT

I. Procedural History

On January 9, 1992, after a bench trial, Petitioner, Dr. Benjamin G. Sprecher was convicted of various securities charges and related offenses. *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). On direct appeal, his conviction was affirmed; but his case was remanded for re-sentencing. *United States v. Sprecher*, 988 F.2d 318 (2d Cir. 1993). On remand, his sentence of imprisonment was reduced to thirty-seven months and an amended judgment of conviction so reflecting was entered on March 13, 1993.

In the Spring of 1993, Dr. Sprecher filed *pro se* motions challenging his conviction and sentence which were treated as a motion pursuant to 28 U.S.C. Section 2255. In his motion, Dr. Sprecher raised various constitutional issues, primary among which were allegations of ineffective assistance of counsel, a denial of his constitutional right to testify and prosecutorial misconduct in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. The district court held a brief and very limited evidentiary "hearing" on some of the allegations and, on March 29, 1994, entered a Memorandum Opinion and Order, denying the requested relief in its entirety.

On appeal, the Second Circuit affirmed and denied rehearing. A Petition for a Writ of Certiorari was filed on July 14, 1995 which was denied. 133 L.Ed. 2d 205 (1995).

On March 1, 1996, Dr. Sprecher filed a second Section 2255 petition based upon newly discovered evidence, some of which the government had only released after a lengthy Freedom of Information lawsuit. In his petition, Dr. Sprecher raised various constitutional issues primarily attorney conflict, government misconduct, including perjury by AUSA's concealment of exculpatory evidence, and agreements with witnesses, concealment of the psychotic condition of the government's "star witness," concealment of other *Brady* and *Giglio* violations. The government did not deny any of the allegations presented in Dr. Sprecher's 2255 petition.

The original trial judge granted Dr. Sprecher's recusal motion on October 3, 1996. The case was reassigned to district court who, on April 1, 1997, District Court Judge Robert P. Patterson entered an order (A6-27) denying without a hearing Dr. Sprecher's 2255 motion, basing his decision upon rank speculation. On appeal, the Second Circuit affirmed (A1-5).

The Court of Appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. Section 1291 and this Court has jurisdiction to review this case pursuant to 28 U.S. C. Section 1254(1). Petitioner asserts that the decision below denying a hearing and establishing a new standard for granting a hearing is in conflict with 28 U.S.C. 2255 and with all other circuits. The lack of denial by the government presents this Court the opportunity to consider the important issue of the applicability of its decision in *Celotex v. Catrett*, 106 S.Ct. 2548 (1986) to 2255 petitions. Petitioner further asserts that the decision below is in conflict with all other circuits and reflects an erroneous decision on important constitutional issues insofar as it allows the use by the government of psychotics as witnesses, without revealing the psychotic condition to the defendant, and rejects as a basis of attorney/client conflict the attorney's flagrant breaching of the terms of his federal probation while representing a federal criminal defendant without revealing the fact to his client. Petitioner further asserts that the decision below reflects an erroneous decision on an important legal question insofar as it finds that Dr. Sprecher waived his constitutional right to testify on his own behalf at trial.

II. Facts Material To The Consideration Of Questions Presented

The following is a concise statement of the facts relevant to this court's consideration of the questions presented.

Dr. Sprecher's Conviction

As noted in the trial court's decision after trial,[1] and in the court's recusal decision, Dr. Sprecher's conviction after bench trial was based upon the trial court's belief in the credibility of the government's witnesses and government representations

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[1] *United States v. Sprecher*, 783 F. Supp. 133, (S.D.N.Y.) 1992)

made to the court. The trial court Judge Cedarbaum recused herself in response to the petitioner's recusal motion based on *Halliday v. United States*, 380 F.2d 270 (1st Cir. 1967), *United States v. Wolfson*, 558 F.2d 59 (2nd Cir. 1977), and *United States v. Robin*, 553 F.2d 8 (2nd Cir. 1977) which mandate the disqualification of a judge at a hearing when the judge had previously made determinations (at a bench trial or hearing) based upon the credibility of witnesses whose credibility was being questioned.

Dr. Sprecher was convicted of a conspiracy to sell "restricted stock" based upon an purported conspiracy to back date documents to make it appear that officers of the corporation had resigned three months prior to their actual resignation. Since the stock was not required to be registered, the conspiracy was illogical and obviously unnecessary to someone who knew the law. Dr. Sprecher knew the law. Indeed, he had won a case against the SEC wherein it was determined that a three-month waiting period was not necessary. *SEC v. Five Star Coal Co., Inc.*, C-2-77-832 (S.D. Ohio, January 9, 1980). On appeal, the government conceded that the stock did not require registration, but argued a conspiracy to violate Rule 144(k). Of course, as Dr. Sprecher knew, Rule 144(j) does not require three months.

As proof of the conspiracy, the government at trial presented a NAGRA tape of a March 30, 1988 meeting attended by Dr. Sprecher, government key witness/informant Louis Foti and one Jay Hastings where the backdating occurred. This tape contained no reference or mention of any intent to backdate documents for any unlawful purpose but, rather legitimately, to memorialize a previously occurring event. The government has never denied that it has never been able to demonstrate one spot on the tape where a conspiracy was discussed or occurred, nor could Foti, at trial, explain why a conspiracy was not mentioned on the tape.

Judge Cedarbaum had to rely on Foti's testimony concerning some purported unrecorded meeting (*United States v. Sprecher, op cit.* 143), and rejected numerous tapes supporting Dr. Sprecher based on a perjurious affidavit of an AUSA.

Judge Cedarbaum additionally based her decision on the law in the Second Circuit at time which did not require materiality. Dr. Sprecher was charged with violations of 18 U.S.C. 1001 rather than the applicable security law provisions.

Based upon Foti's testimony, Judge Cedarbaum additionally convicted Dr. Sprecher of a conspiracy to defraud the government. Dr. Sprecher was not charged with any IRS violation since, as was ascertained, after Dr. Sprecher's first post-conviction motion, the IRS refused to authorize such a prosecution. According to Foti's testimony, which was contradicted by his plea allocution and documentary evidence he owned all the shares of "Towers" which KKP[2] sold under KKP's TIN number. The sale under KKP's tin number, according to Foti, was done in order to avoid paying the taxes Foti owed on the sale. Foti's testimony contains the absurd assumption that Foti, a trained accountant who never filed tax returns, would willingly pay 50% of the sales proceeds to avoid paying a maximum tax rate of 46% on the sales proceeds. Judge Cedarbaum believed Foti's testimony because she was led to believe by the government that KKP was a farce controlled by Sprecher as a tax scam. Based upon this belief she believed that Sprecher perjured himself when he was questioned in 1985 by a Thompson Von Stein ("Von Stein") of the SEC in regard to KKP. (Questions concerning KKP were less than one percent of a lengthy, two-day questioning.)

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[2] Kahila Kadeshia Parkofski, a tax-exempt charity controlled by Dr. Sprecher.

Von Stein invoked privilege in response to a trial subpoena, and refused to appear at Sprecher's trial. Therefore Sprecher was probably the only individual convicted of perjury where the person to whom he purportedly lied refused to appear to testify as to those lies, or to produce the notes and papers used during the questioning. These papers would have proved Dr. Sprecher's innocence.

With regard to the obstruction of court proceedings in Utah that Dr. Sprecher was convicted of, the judge who was purportedly obstructed ignored the entire issue when it was presented to him since it was an obvious typographical error significantly less egregious than the errors committed by the SEC in that case. The only trial witness against Dr. Sprecher on this issue was one Kenneth Israel, an SEC employee who was not even a participant in the Utah court proceeding purportedly obstructed.[3]

In order to bolster the credibility of Foti, the government maintained and AUSA Kevin Czinger testified under oath that Foti had not violated his cooperation agreement signed in February, 1988 until he entered into the tax conspiracy with Dr. Sprecher which was not discovered by the government until May, 1990. Just prior to trial the government gave Dr. Sprecher a number of tape recordings claiming they had just received them from Salt Lake City. These tapes indicated that Foti had been caught committing crimes in Salt Lake City. In March, 1990, when Foti was questioned at trial, both on direct and on cross

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[3] The original indictment against Dr. Sprecher was limited to the obstruction and perjury counts. As Dr. Sprecher refused to cooperate against his clients, with Foti's ever-changing, contradictory testimony, the charges were continually expanded and changed until a third superseding indictment.

examination he persistently denied that he was arrested in Salt Lake City and asserted that no one there had told him he had committed a crime. Czinger's testimony as well as numerous other misrepresentations by the government were made to support Foti's testimony and conceal the truth of what occurred in Salt Lake City.

In order to destroy Dr. Sprecher's credibility, the government brought in from Las Vegas one Carol Bernard who testified with regard to who committed certain forgeries. She testified that she had not and implied that Dr. Sprecher had. To bolster her credibility, she also falsely testified on direct and on cross examination that she had only been fined by the NASD and that she had voluntarily resigned therefrom.

In order to hamper Dr. Sprecher's defense and allow Foti free and unimpeded access to Dr. Sprecher's law office (where he rented an office in Dr. Sprecher's suite), the government had the court deny bail to Dr. Sprecher by falsely maintaining that Dr. Sprecher was a flight risk who had a false passport. Accordingly, Dr. Sprecher was denied bail which hampered and impaired his defense, limited his choice of counsel, causing him to retain Ivan Fisher. As a jailed defendant, Dr. Sprecher's credibility image to the Court, the eventual fact trier in his trial, was impugned. Furthermore, coincidentally with Dr. Sprecher in jail without bail and Foti's unhampered access to Dr. Sprecher's law office, numerous papers and computer discs containing exculpatory material disappeared from his law office. Dr. Sprecher was represented by Fisher of *United States v. Levy*, *op cit.* fame. Fisher conducted no discovery, did not interview any possible defense witnesses, failed to make necessary motions, failed to call to the stand any witnesses with personal knowledge of the facts, and told Dr. Sprecher that if he agreed to a non-jury trial he would let Dr. Sprecher testify at trial in his own defense, then

reneged on this promise and threatened to resign and withdraw mid-trial if Dr. Sprecher testified.

Sprecher's First Post-Conviction Motion

Judge Cedarbaum had held a hearing lasting approximately one hour on this motion. Dr. Sprecher was not permitted to call any witnesses and was denied any discovery. The government was permitted to call any witnesses it desired. When the government called Fisher to testify, in response to a question by the court concerning his threats to resign if Dr. Sprecher insisted on taking the stand in his own defense, Fisher replied equivocally stating that he was not sure if he did or did not threaten to withdraw if Dr. Sprecher testified. The Solicitor General in responding to Dr. Sprecher's certiorari petition to this court maintained that Judge Cedarbaum credited Fisher's denial of these threats to resign (despite Fisher's equivocation) and thus this court should not consider the issue since this was a factual determination. Judge Cedarbaum refused to hold a hearing on ineffective assistance of counsel ruling that all of the deficiencies alleged did not rise to the constitutional level of ineffective assistance and were rather, "strategic" differences.

Dr. Sprecher maintained that based upon an NASD decision regarding her, Carol Bernard had lied under oath when she testified she was only fined by the NASD and the government knew that she had been expelled from the NASD for forging her clients' signatures. The government sought to conceal her perjury and its own misconduct by producing a computer run which it falsely represented to the Court was produced by the NASD and which reflected that Carol Bernard was "for our own reasons" allowed to resign. The government repeated this lie to the Second Circuit who, like Judge Cedarbaum, believed the government and ignored Dr. Sprecher's protestation that this was an SEC computer run inferring a quid pro quo "arrangement"

between the SEC and Carol Bernard in anticipation of her testimony against Dr. Sprecher, concealment of which was a *Giglio* violation.

New Evidence

Based upon only a limited amount of Freedom of Information material finally made available to Dr. Sprecher only after a lengthy law suit as well as information received post-trial from other sources only recently obtainable, Dr. Sprecher learned the following facts to the district court which denied Dr. Sprecher's second 2255 petition and presented in the form of documentary evidence:

On March 8, 1987, the FBI, in conjunction with Salt Lake City Justice Department ("SLC") entered into an undercover operation, code named "Incwell." Incwell was very successful and among numerous other individuals, it trapped one of Sprecher's clients and, upon information and belief, either directly or indirectly, also trapped Edward Grushko, an attorney who years prior, had been associated with Sprecher. Grushko immediately turned on his clients. In 1989, Incwell determined to target Sprecher, who the Incwell reports describe as "an internationally known securities attorney" who "represented many clients in some very high profile cases involving securities matters." The FBI, in conjunction with SLC, determined that "in view of Sprecher's level of prominence" the SEC was not to be informed. On December 18, 1989, Incwell received "ELSUR" permission to tape Sprecher. Pursuant to that permission, two undercover operatives on or about January 4, 1990, met with Foti, a client of Sprecher's in one of Sprecher's law office conference rooms. As was normal, Sprecher was asked certain legal advice, but did not get involved. One of the more important occurrences at that meeting was that Sprecher was asked to backdate a simple letter and he literally blew his top. A tape of

that meeting would have served many purposes for Sprecher's defense. Since "ELSUR" approval had been granted for this meeting, the government's denial of the existence of the tape made prior to and during Sprecher's trial appears to be false. After the initial meeting, Foti was led on and met with FBI agents (Incwell agents) around the country, and was finally arrested on March 1, 1990 and asked to cooperate to get Incwell's target, Sprecher. Foti apparently explained that he was already an SEC and New York Justice Department agent working to "get" Sprecher.

The Salt Lake City Justice Department then contacted the Southern District of New York and also Von Stein of the SEC. Foti was released to AUSA Czinger of the Southern District of New York. Transcripts of all tapes made of Foti or Sprecher, as well as other documents, were delivered to AUSA Czinger and an agreement was made between and among these agencies and Foti to somehow cover up this embarrassing situation wherein a government cooperating informant was caught while Dr. Sprecher, the target remained free. This was not to be allowed and Dr. Sprecher was to be made to cooperate against his clients.

Since the only means available to accomplish this result was Louis Foti, Foti had to be made to appear credible and all traces of Incwell and Foti's Salt Lake City crimes and arrest had to disappear and remain hidden and concealed from Dr. Sprecher at his trial.

Accordingly, and in pursuance of this campaign of government concealment, the following violations occurred: AUSA Czinger falsely swore under oath that Foti's first cooperation agreement was, in fact, until May, 1990 when, in truth, Foti's cooperation was automatically terminated on or about March 1, 1990 when he was caught committing a crime in

Salt Lake City. Foti was not to be charged in Salt Lake City until after Sprecher's trial. This agreement was not revealed at trial, contrary to the well-settled law that all such agreements must be revealed, even if they are informal, *e.g. Giglio v. United States*, 405 U.S. 501 (1972); *Dubose v. Lefevre*, 619 F.2d 973 (2d Cir. 1989); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979). All FBI 302's and underlying notes of Incwell were not produced. Foti was to conceal his crimes in Salt Lake City and falsely testified that no one in the government told him he had committed a crime denied he was arrested in Salt Lake City. The government's concealment of Incwell also prevented Sprecher from attacking Foti's credibility based on Foti's anger that he was caught in a sting operation aimed at Dr. Sprecher. Another clear *Giglio* violation.

To further the government's concealment and to prevent Dr. Sprecher from having a fair trial, AUSA Czinger falsely represented to the court that he had reliable evidence that Dr. Sprecher had a false passport and intended to flee the country. The FBI reports not obtained through the Freedom of Information lawsuit prove that significantly prior to Sprecher's arrest following an intensive FBI investigation pursuant to a Justice Department request, it was determined that Dr. Sprecher did not have a false passport and correspondingly, that Foti's passport story was false. Rather than reveal this information to the Court, in direct violation of *Giglio* the government knowingly concealed these facts to cause bail to be denied to Sprecher. While Sprecher was thus unlawfully confined without bail mysterious "break-ins" to Sprecher's law office resulted in the selective "disappearance" of exculpatory papers and computer discs. Moreover, as a result of this unjustified incarceration, Dr. Sprecher's credibility always remained suspect in mind of the court, the eventual fact trier. Accordingly under the ruling of the

Ninth Circuit case of *United States v. Jerrigan,* 582 F.2d 1211 (9th Cir.1978), the conviction should have been vacated.

To further prevent Dr. Sprecher from learning exculpatory information and proving his innocence the Justice Department tampered with the cover pages of the transcripts of Foti tapes to conceal that the transcripts were made by the SEC and AUSA Andrew Tomback submitted a false, perjured affidavit to the court stating that the Justice Department made these transcripts. The reason for this perjury was to keep Von Stein out of the case because if called to testify he might have to reveal the truth about Incwell. Most particularly, it would have to be explained why contrary to SEC regulations, the SEC allowed continued trading in World Wide Medical stock, when the government was claiming at trial that trading in that stock was fraudulent. In addition, it would have to be explained why Foti's sale of stock was permitted after knowledge and proof of Sprecher's supposed criminality was brought to light. These revelations could show that the SEC allowed the public to be defrauded in order to make a case against Sprecher, an unlikely scenario. Or it would show the truth: there was no fraud on the public and thus there was also no case against Sprecher. Thus caught on the horns of a dilemma, it was undoubtedly easier to claim the transcriptions had been made by the Southern District (which they had not), and not by the SEC (which they had). Similarly it was the government's tactic to invoke privilege as additional "insurance" to keep Von Stein from being called to testify at Sprecher's trial. Indeed, AUSA Tomback's misrepresentation short-circuited any chain of custody questions which would require Von Stein's presence on the stand. AUSA Tomback's perjured affidavit additionally stated that no log existed of the tapes. This was a blatant falsehood and prevented the defense from effectively using all the tapes which supported its contentions because the government could always argue, as it did, that the dates of these

tapes were unreliable. Therefore the court could never pinpoint the dates and was thus enabled to find a recent fabrication, where there was none. *United States v. Sprecher*, 783 F. Supp. 133, at 145, *supra*.

The government failed to produce tape made by the agents attending the January 4, 1990 meeting after receiving the December, 1989 "ELSUR" authority to tape Sprecher. The reason for this non-production was that the tape was highly exculpatory to Dr. Sprecher and showed his strong refusal unlawfully to backdate any document. Its production would also reveal Incwell. For similar reasons, the tape of Foti's interrogation in Salt Lake City on March 1,1990 was never produced.

As further corroboration of Foti's perjury, Dr. Sprecher produced two letters, both written by William R. McLucas, SEC Director of Enforcement in response to inquiries from the two New York U.S. senators regarding Foti's activities in Salt Lake City. The SEC was the appropriate agency to address this inquiry since Foti was under the supervision of Von Stein of the SEC and Mary Beth Walz, an SEC attorney was on assignment to the Utah U.S. Attorney's office and was the AUSA in charge of Foti's case in Salt Lake City. These two letters unequivocally state that Foti was in fact arrested in Salt Lake City on March 1,1990.

> During February and March, 1990, Mr. Foti was bound by a plea and cooperation agreement with, and was an informant for, the United States Attorney's Office for the Southern District of New York in connection with an unrelated matter. ***On March 1, 1990, Mr. Foti was arrested in Salt Lake City, Utah by FBI in an undercover operation*** directed at abuses in the

> penny stock markets. Mr. Foti fraudulently attempted to sell common stock of New Minority Ventures, Inc...to an undercover FBI agent. (Emphasis added.)

In addition to these letters, petitioner also uncovered the FBI 302 forms which were generated 19 days after the Salt Lake City "surprise", but were never turned over to the defense at trial, as required, *e.g., Brady v. Maryland, op cit.*; *Giglio v. United States, op cit.*; *United States v. Harrison*, 524 F.2d 421 (DC Cir. 1975). Nor were they presented to the District Court for *in camera* inspection, as required by this court. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58-62, 107 S. CT.989, 1002-33.[4]

One FBI 302 records:

> Foti was immediately advised of certain of his Rights through the presentation of an FD-395-Interrogation; Advice of Rights Form. Additionally, SA MCLEAN orally advised Foti of the rights contained on the form.

These are the rights given to individuals who are under arrest.

In order to prejudice the court against Dr. Sprecher and to provide a rationale for the perjury and obstruction charge the government spent approximately thirty percent of the court trial time including a large graphic display claiming that KKP was a phony entity and a tax fraud. What the government failed to

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[4] The government failed to produce any 302's or notes underlying the 302's to the court or Petitioner and, as of this date, Petitioner has been unable to obtain these documents as well as various audio and video tapes.

produce was the result of a joint Justice Department-SEC-IRS investigation which had determined that KKP was, in fact, a legitimate charitable institution. This explains why the IRS never charged either Dr. Sprecher nor KKP with tax crimes. The IRS, never reluctant to prosecute tax fraud, was unwilling to give its permission to do so where no such crime existed since they were not involved in the Incwell fiasco.

As a further attempt to prejudice the court against Dr. Sprecher, one of the first witnesses to testify at his trial was a Carol Bernard who testified about some forgeries, giving the impression that Sprecher committed the forgeries. The government failed to disclose that Bernard was expelled from the NASD for forging her clients' signatures. Indeed, with government's knowledge, Bernard falsely testified that she had only been fined by NASD and failed to testify as to her forgery. In Dr. Sprecher's first post-conviction motion he proved the falsity of Bernard's testimony by presenting the decision of the NASD regarding its action against her. The government countered by presenting a computer run which they represented as an NASD computer run. This computer run stated that Bernard was "permitted to resign." Sprecher pointed out that the supposed NASD run was in all probability an SEC computer run. If Bernard was permitted to resign from the SEC, there was a possible *Giglio* violation since the SEC does not allow NASD expellees to resign. The government, however, maintained its misrepresentation, even to the Court of Appeals. Due to a change in regulations, Sprecher finally was able to obtain the actual NASD computer data which showed that Bernard was "censured, fined $45,000, barred from association with any member of the association in any capacity, and assessed costs..."

Clearly, the government thought highly enough of the importance of Bernard's testimony to be willing to fabricate and

misrepresent to the District Court and the court of appeals and to engage in deliberate *Giglio* and *Brady* violations.

Based upon the FBI files, Dr. Sprecher learned that the only witness against him with respect to the obstruction charge in Salt Lake City, a Kenneth Israel of the SEC, was involved in the Incwell operation and was to a great extent responsible for allowing the continuance of the failed sting operation against Dr. Sprecher. The government failed to reveal this fact, an obvious *Giglio* violation.

Based upon testimony at a hearing in an unrelated case by Edward Grushko government rebuttal witness at Dr. Sprecher's trial, Dr. Sprecher discovered that AUSA Tomback in addition to his previously described illegalities, also failed to produce interview notes of Grushko and other witnesses and failed to produce important material negating Grushko's credibility.

Mental Condition

Foti, the government's star witness was sentenced on December 21, 1995. At his sentencing the presiding District Court judge found that well before and during Dr. Sprecher's trial, Foti was a "manic depressive, under constant medication and that his mental derangement was so severe that it reflected diminished capacity under the Sentencing Guidelines (5H1.4) and accordingly, sentenced Foti giving consideration to 5H1.4.

The mental condition from which Foti was suffering (manic depression) subjects a person to alternating phases of mania and depression. The mania phase, if severe, may involve delusions and the making of nonsensical associations. "He is likely to misidentify people, become momentarily confused about time and place...he may also carry on conversations with people he

imagines to be present." The delirious form may involve disorientation and "vivid auditory and visual hallucinations."[5]

The government who supervised and controlled Foti for many years knew or should have known in all due diligence by the time of Sprecher's trial that Foti suffered from this mental condition. For at least one year prior to Dr. Sprecher's trial the government monitored and had to approve all of Foti's expenditures which would have necessarily included expenditures for medications and psychiatric care and treatment.

Fisher

Dr. Sprecher's trial attorney was Ivan Fisher. Fisher represented Sprecher, except for a one week period, throughout the lengthy pre-trial phase of the case and throughout the trial . As the Second Circuit found it its decision on Sprecher's first post-conviction motion, "the record here does not support the conclusion that Fisher fully and clearly informed Sprecher of the potential implications either of the alleged conflicts or of a waiver." *United States v. Sprecher*, 50 F.3d 3, (2nd Cir.1995). The Second Circuit nonetheless went on to sustain Judge Cedarbaum's denial of Sprecher's post-conviction relief since it believed that Fisher had only a potential, not an actual conflict and Fisher had nothing to gain from "tempering " Sprecher's defense in order to curry favor with the prosecutors. What the Second Circuit did not then know at the time appeal briefs were submitted and oral argument had occurred (and as Judge Cedarbaum did not know at time Fisher testified at Sprecher's first post-conviction hearing) was that Fisher in fact had a very important reason "to curry favor with the prosecutor." Fisher was on federal probation the terms of which required him to file

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[5] Goldenson, *The Encyclopedia of Human Behavior*, (Doubleday & Co.), pp.723-731.

all state tax returns and pay his state taxes, which he had failed to do. Accordingly Fisher was violating his probation and vulnerable to summary federal arrest, prosecution and imprisonment. It was during this probation violation period that Fisher represented Dr. Sprecher in the crucial pre-trial preparation phase of the case. Even at the time of Dr. Sprecher's trial after Fisher had completed his "early" probation, Fisher still was not "off the hook" since the federal prosecutors could have at any time informed the disciplinary Bar authorities of Fisher's egregious violation of his federal probation, exposing Fisher to sanctions ranging from censure to disbarment.

Again, it must be stressed that the government never denied any of the foregoing facts.[6]

DISTRICT COURT DECISION

The district court's decision which the Second Circuit affirmed in its entirety is contrary to the law of all the circuits and consists of rank speculation, circular reasoning and misreading of the record to reach its conclusions.

Standard

The district court decision set the standard for granting or denying a hearing as whether the court considering the petition

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[6] Perhaps being certain of immunity from any penalty for misrepresentation to the courts, the government brazenly and fearlessly submitted an affidavit of FBI Special Agent David G. McLean (written in 1994) as part of the appendix to its reply brief to the court of appeals for the Second Circuit. In their reply brief, the government, for the first time, claimed that the affidavit contained a denial of Foti's arrest in Salt Lake City. During the Second Circuit oral argument, the government did not and could not deny that this claim was just the latest of a series of government misrepresentations to various courts.

believes the evidence is speculation. (A22.) Hearsay evidence is insufficient for a hearing (A22). Based upon the "speculation," standard a hearing on government misconduct is "denied." All Incwell papers are ignored together with the obvious perjuries of AUSA Tomback and AUSA Czinger. The obvious "unwritten," informal cooperation agreement is ignored, as is the wrongful denial of bail to Dr. Sprecher and the disastrous effect this had on Dr. Sprecher's defense. The district court ignores the government's lack of denials of any of the allegations and, rather, engages in its own speculation. For example, the court reasons since a code name of the spin-off of "Incwell" was given January 10, 1990, no taping of Sprecher could have occurred on January 4, 1990 since the investigation did not start until January 10, 1990 (A24). Of course the court reasoning fails to explain how this speculation comports with the fact that on December 14, 1989 ELSUR authorization was given to Incwell to tape Sprecher. If no investigation by Incwell existed until January 10, 1990, how could authority have been granted on December 18, 1989.

The following are just some examples of the district court's employment of bare speculation to support its conclusions. The decision rejects a hearing on Foti's perjury on the issue of his arrest in Salt Lake City or to any of Foti's perjury on this issue. In arriving at this rejection, the district court rejects SEC Director of Enforcement William McLucas' letters to two U.S. senators reciting Foti's arrest in Utah on March 1, 1990 based on the speculation that McLucas had no direct knowledge of what happened since his agency did not make the arrest (A21). This rejection, aside from assuming that the Director of Enforcement of the SEC would lie to two senators ignores the fact that Mary Beth Walz, an SEC attorney on loan to Utah U.S. Attorney was the AUSA in charge of Foti's case in Salt Lake City. The FBI 302 which demonstrates that Foti was arrested is ignored since,

according to the district court, the fact that Foti was advised of his rights in a manner given to individuals arrested, is inconclusive and it is not an uncommon practice for "an agent not to arrest a suspect." (A21.) Apparently the district court apparently felt that evidence "beyond a reasonable doubt" must first be furnished by a petitioner in order to obtain a hearing.

The speculation of the district court even contradicts the trial judge who rendered the decision in the bench trial. Judge Cedarbaum in her decision granting recusal made it abundantly clear that she had relied on testimony of witnesses (*e.g.*, Foti) to convict and in the decision in *United States v. Sprecher*, 783 F. Supp 133, 143, and she made it crystal clear that the March 30, 1988 tape was insufficient *per se* to convict and Foti's testimony regarding a prior untaped meeting was needed to establish the conspiracy. The district court nonetheless speculates (A20) that the "March 30, 1991"[7] NAGRA tape was the trial judge's basis for conviction. In fact, the government never denied that the March tape was devoid of any mention of conspiracy to backdate and that all tapes demonstrated the absence of any unlawful conspiracy. The government never denied that AUSA Tomback's perjury was necessary to avoid consideration by the trial court of exculpatory tapes. (Under cross-examination Foti could not explain why no mention of a conspiracy was contained on the March 30 tape.)

With regard to Carol Bernard, the district court resorts to complete and incorrect speculation (A25) and avoids addressing the government misrepresentation to the District Court and the

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[7] Of course there was no March 30, 1991 NAGRA tape, only a March 30, 1988 tape which the court would have realized if it held a hearing, or even listened to the tape. Of course, if it had listened to the tape, it would not have made the statement.

Second Circuit. It, rather, maintained without any hearing or review, that Bernard's decision was not material. Judge Cedarbaum referred to Bernard's testimony in her decision following the trial. *United States v. Sprecher*, 783 F. Supp. 133, 138 and in her decision on Sprecher's first post conviction motion *U.S. v. Sprecher*, 1994 WL 115998 S.D.N.Y. March 29, 1994.

The district court (A10) Footnote 2, engages in the most brazen circular reasoning to assume that Sprecher would enter in the stock conspiracy charged. Based upon Sprecher's victory in *SEC v. Five Star*, *op cit.*, he knew (perhaps Judge Cedarbaum did not) that a "three-month" waiting period was not legally required, and therefore, no backdating was required to "free" the stock. Nonetheless, the district court speculated that since Foti testified that Sprecher sent in forms to the SEC (Sprecher's signature was not contained on these forms) giving a wrong date and Sprecher was convicted on Foti's testimony, Sprecher must have "believed that the expiration of the three months was legally required." This logic ignores the fact that it was precisely Sprecher's legal knowledge that the three-month wait was not required that demonstrates no motive to backdate and correspondingly shows Foti's perjury regarding the backdating charge.

Mental Condition

The district court held that as long as the trial court knew that Foti was a "con-man" the concealment of his mental condition as a "manic-depressive" was irrelevant (A19), thus equating a con-man who may knowingly perjure himself to gain an advantage with a mad man who may not even know the difference between fact and illusion. Moreover, according to the District Court, the taking of medication to alleviate mental disorders at the time of trial testimony, is irrelevant and need not be revealed.

Attorney Conflicts

With respect to Fisher, after ignoring the thrust of Dr. Sprecher's new evidence and misstating the record, the court concluded that even if Fisher did not pay his taxes while on probation it "would not reasonably have caused Fisher to 'believe he had an interest in tempering Sprecher's defense in order to curry favor with the prosecutor.'" (A18.) Thus according to the district court, no conflict of interest arises when an attorney representing a federal criminal defendant is vulnerable to summary federal arrest for his own probation violation since such an attorney has no discernible interest in currying the prosecution's favor to avoid arrest.

Holdings - Second Circuit

The Second Circuit, by affirming Judge Patterson's decision, now holds:

1. That in order to obtain a hearing in a 2255 motion, even if the government fails to deny the allegations made therein, proof beyond "speculation" is required. Hearsay evidence is insufficient. The court can deny a hearing based upon pure speculation by the court.

2. A witnesses' psychiatric history and condition can be withheld by the government from the trier of facts provided the government furnishes some evidence of the witness' lack of credibility which may be unrelated to his mental disorders.

3. An attorney while representing a federal criminal defendant need not reveal to his client that he (the attorney) is in violation of his federal probation and subject to summary arrest, prosecution and imprisonment and such violation of probation causes no actual conflict as to create a divergence of interests.

4. Since Judge Patterson refused to grant a hearing on the issue of whether Fisher threatened Sprecher to prevent him from testifying at his trial, such actions are permitted. If this was not the law in the Second Circuit, a hearing at least regarding Fisher's credibility on this issue was mandated.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit Decision Conflicts With all Other Circuits - The Rationale of *Celotex* Should be Applied to 2255 Petition

While petitioner realizes that a hearing is not required in all 2255 motions, nonetheless in all circuits courts denying a hearing face a heavy burden to deny a hearing. In order to deny a hearing, the claims in the 2255 must be unsupported by any corroboration, *United States v. Little*, 608 F.2d 296, (8th Cir. 1979), *cert. denied*, 100 S. Ct 1053, or the claims have to be "palpably incredible" or "patently frivolous," *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982), or based upon unsupported generalizations *United States v. Guerra*, 588 F.2d 519 (5th Cir. 1979) or conclusory, *Barker v. United States*, 7 F.3d 629 (7th Cir. 1993), *cert. denied* 114 S. Ct. 939.

If there is any evidence at all, a hearing must be granted. The standard for granting a hearing in all other circuits is that enunciated by Chief Judge Breyer in *United States v. Rodriguez Rodriguez*, 929 F.2d 747 (1st Cir. 1991) at 749-750:

> Furthermore, Section 2255 provides that a petitioner is entitled to an evidentiary hearing "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief..." Accordingly, "a petition can be dismissed without a hearing if the petitioner's allegations, accepted as true, would

> not entitle the petitioner to relief, or if the allegations cannot be accepted as true because "they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (quoting *Myatt v. United States*, 875 F.2d 8, 11 (1st Cir. 1989)). Rodriguez' allegations concerning Varela's divided loyalty relate to matters outside the record of his conviction, are not inherently incredible, and are not conclusory. [Emphasis added.]

Second Circuit Conflicts With Other Circuits

The Second Circuit, by affirming the district court, established a new standard which must be met by a 2255 Petition in order for the petitioner to obtain a hearing. The petitioner must produce evidence which is not "speculative" or hearsay. The Second Circuit does not define "speculative" but apparently, following the application of the standard by the district court, the evidence presented must be proof beyond a reasonable doubt. The district court, in applying this standard, rejected two letters from McLucas, Director of Enforcement of the SEC, responding to inquiries by two senators concerning what occurred with regard to Foti in Salt Lake City. These letters were rejected even though the AUSA prosecuting Foti in Salt Lake City was an employee of the SEC, subordinate to McLucas, on loan to the Salt Lake Justice Department. The Second Circuit, in applying this new standard, apparently believed that a district court can deny a hearing as long as the district court can hypothesize as to a possible flaw in the evidence presented no matter how outlandish the hypothesis. The district court, with respect to the evidence presented by Dr. Sprecher, engaged in a series of such outlandish hypothesis, as McLucas was from a different agency

so he did not know what he was writing, the FBI gives *Miranda* warnings to unarrested individuals.

Since hearsay is rejected, almost all documentary evidence, including FBI reports, government documents, court documents, can be (as was done by the district court) rejected as evidence for granting a 2255 petitioner a hearing.

The denial of a hearing, according to the Second Circuit, is proper even if the government fails to deny the allegations.

Lack of Government Denial and Conflict with Other Circuits

This court in *Remmer v. United States*, 347 U.S. 227, 229 (1954), while not establishing a definite rule, held that since there were no denials by the government, a hearing was mandated. In *United States v. Abou-Saada*, 785 F.2d 1, 6 (1st Cir. 1986), the First Circuit held that in the absence of a denial by the government, a hearing was mandated.

Thus the Second Circuit's decision in this case directly conflicts with the First Circuit's and this court's views on this important and recurring issue.

The Decision Below Reflects An Erroneous Ruling On A Fundamental And Recurring Issue

Based upon the above, there would be more than a sufficient basis for granting this petition. The Second Circuit's decision conflicts with all other circuits and the 2255 statute itself. Unfortunately, in our overburdened judiciary system, the courts are tending to avoid hearings on post conviction motions and are constantly attempting to restrict such motions thereby unintentionally furnishing the opportunity, as shown by the instant case, for illegal prosecutorial activity by the government without any fear of reprisal or consequence.

Accordingly, this court should explicitly establish the standard with respect to granting or denying a 2255 evidentiary hearing.

The *Celotex* Rule

The present case provides this court with the opportunity to consider the important issue of whether *Celotex*, *op cit.*, should apply to criminal cases. This court's decision in *Remmer* (*op cit.*) occurred prior to its decision in *Celotex*, *op cit.*, wherein it established the rule, which has been applied by lower courts in almost every type of civil proceeding; that if a civil litigant fails to deny the allegations in a movant's application for summary judgment, then summary judgment is appropriate and must be granted. The rationale for this rule is that a litigant should not suffer the burdens of litigation where no triable issue of fact is raised by his adversary. Nor need the court system be unnecessarily burdened by issues requiring no proof by reason of non-denials by an adversary.

The rationale of *Celotex* applies with greater force to criminal defendants, especially those under disabilities or incarcerated. Every day's delay imposes expenses and hardship on the individual and his family, while imposing no harm on the government. The judicial system is so overburdened that, while a 2255 petition should, by statute, be heard promptly, delays of a year from filing are common. The vagaries of the legal system give hope to the government without any cost. A judge's friendship with another judge who is forced to recuse him or herself can lead to delay and/or inappropriate rejection of facts. An appeals court's dissatisfaction with this court's holdings such as those contained in *Lindh v. Murphy*, ___ U.S. ___, 65 LW 4557, June 23, 1997 can lead the appeals court to make decisions it would not normally make, especially unpublished decisions in

the mistaken belief that if unpublished, the decisions will not be cited or relied upon as decisional precedent..

By applying *Celotex* to 2255 petition this court will be granting 2255 petitions the same rights as other civil litigants which due process would require, while simultaneously helping eliminate the criminal case backlog and placing the burden where it belongs, on the prosecutor to reveal the facts to the court as required by *Brady* and *Giglio*.

II. A Witness' Psychotic Condition Must be Revealed and if Discovered After Trial, Depending on the Importance of the Witness, Reversal is Mandated - Second Circuit in Conflict With all Other Circuits

Every circuit considering the issue of mental illness has held that severe or serious mental disorders of a witness must be revealed and if not, reversal is mandated, whether based on the Confrontation Clause of the Sixth Amendment of the Constitution or on *Giglio*, *op cit*. *See United States v. Price*, 938 F.2d 1343 (D.C. Cir. 1991); *United States v. Butt*, 955 F.2d 77 (1st Cir. 1992); *United States v. Moore*, 923 F.2d 910 (1st Cir. 1991); *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983). Of course not all psychiatric problems or neuroses are relevant *e.g.*, if the mental condition occurred ten years prior to trial, *United States v. Moore*, 923 F.2d 910 (1st Cir. 1991), or was not serious *United States v. Antone*, 981 F.2d 1059 (9th Cir. 1992). Even these cases stand for the rule that severe mental illness like that of Foti's which existed at time of trial must be revealed or reversal is mandated. Foti's type of psychosis have troubled state courts causing them to limit the responsibility of such individuals. "The courts have been concerned with the problems of patients with manic-depressive disorders who may understand the nature and consequences of their transactions but who in their driven manic state are likely to make irrational

contracts."[8] In fact, people exhibiting the traits of manic depression, have been found so impaired as to be unable to enter into valid contracts, *e.g.*, *Ortolere v. Teacher's Retirement Board*, 250 N.Y. 2d 196 (1969).

Important, Recurring Issues Requiring the Imprimatur of the Court

This court as of this date has not made any pronouncements with respect to mental illness, unfortunately an increasingly common occurrence in our stress-laden society. The Second Circuit's decision in this case, if taken to its extreme, which unfortunately in our times is likely to occur, could conceivably result in a madman being released from custody and used by unscrupulous prosecutors to testify based upon his hallucinatory episodes without revealing this fact to the defense. Indeed the prosecutors could (in accordance with Second Circuit's view) defuse the risk of non-disclosure by disclosing some other evidence of lack of credibility unrelated to mental illness (*e.g.*, prior criminal record, etc.) thus lending the impression of rationality but correspondingly immunizing the government against any consequence for non-disclosure of the witness' mental illness.

Accordingly, it is incumbent upon this court to establish some uniform standards regarding the government's duty to disclose mental illness similar to those established by most federal circuits and the state courts.

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[8] Halleck, *Law in the Practice of Psychiatry*, (Plenum Medical Book Co.), 271

III. Does an Attorney's Violation of Probation While Representing a Criminal Defendant Create an Actual Conflict

Background

Several circuits including the First Circuit in *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985); the Third Circuit in *United States v. Gambino*, 864 F.2d 1064 (3rd Cir. 1988), *cert. denied*, 492 U.S. 906, and the Second Circuit in *United States v. Levy*, 25 F.3d 146 (2d. Cir. 1994) have established the rule that if an actual attorney-client conflict is established, all that has to be demonstrated is that a viable alternative strategy existed which, but for the conflict, would have been followed. There is no dispute in this case that a viable alternative strategy could have been followed. Such as pressing for discovery, moving for dismissal based on government's invocation of privilege, objections to certain government witnesses, *e.g.* Grushko, refusal to enter into any stipulations the government requested, moving for dismissal based upon violation of the speedy trial act rather than permitting the government continuously to formulate superseding indictments tailored to Foti's ever changing, delusional testimony. Judge Cedarbaum found (*U.S. v. Sprecher*, 1994, *op cit.*) there were alternative viable strategies, but at that time the law in the Second Circuit was that even after establishing an actual conflict, the attorney had to be found constitutionally ineffective, an almost impossible burden. Judge Cedarbaum granted no hearing on this very issue and just relied on her recollection that Fisher had objected at trial to various questions and Fisher's affidavit (prior to the decision in *Levy*, *op cit.* which described Fisher's credibility) which stated that he only had Dr. Sprecher's interest in mind.

Other circuits realizing as did the First, Second and Third Circuits that constitutionally ineffective assistance was too heavy a burden for a defendant to meet in cases of actual conflict,

established lower burdens under the circumstances of conflict. *e.g.* the Fifth Circuit established "adverse effect," a somewhat lower standard than the *Strickland* standard. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052; *United States v. Abner*, 825 F.2d 835 (5th Cir. 1987).

Conflicts With Other Circuits.

No matter what test the circuits established, every circuit held that if an attorney was subject to criminal charges while representing a client in a criminal case, a conflict existed. *United States v. McLain*, 823 F.2d 1457 (1st Cir. 1987); *Tompkins v. Choen*, 956 F.2d 330 (7th Cir. 1992).[9] Or course Fisher's situation was significantly more precarious. He was not merely indicted. He was in actual violation of probation and subject to summary arrest. The Second Circuit's decision in this case manages to emasculate its decision in *Levy, op cit.* and all other circuits' decisions with respect to conflict. If an attorney violating his probation is not in actual conflict with his client and experiencing a dramatic divergence of interest as between himself and his client, what could possibly be more conflicting? Possibly releasing a lawyer from jail to defend a client while not revealing the fact to the client.

The Decision Below Affects Fundamental and Recurring Issues of National Importance

Unfortunately in our present day the issue of attorney conflict is an increasingly common problem. In Dr. Sprecher's case at least three attorneys were involved, either directly (*e.g.*, Fisher)

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[9] The fact that two districts were involved, Dr. Sprecher's case was in the Southern District while Fisher's was across the East River in the Eastern District of New York, is a distinction without a difference. It is commonly known and indisputable that these two districts communicate and cooperate on a regular basis. Moreover, Fisher lived in and had his law office in the Southern District of New York.

or indirectly (*e.g.*, Grushko, a witness) who had cooperated with the government. Moreover, the issue of whether and to what extent an attorney's conflict results in vacating a conviction should be examined. Is the standard that of the Fifth Circuit? Of the First Circuit? Of the Seventh Circuit?

IV. Does an Attorney's Threat to Prevent a Client Testifying on his own Behalf Mandate Reversal of a Conviction

In reply to Sprecher's previous petition for certiorari, the Solicitor General implicitly concurred that the issue of Fisher's threats to withdraw if Sprecher insisted on testifying in his own behalf was indeed a ground for accepting the petition in light of *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992 *en banc*) which held that if such threats prevented the defendant from testifying then reversal was mandatory and the resultant conflict between circuits. The Solicitor General, rather, argued that the district court credited Fisher's testimony that he did not threaten Sprecher[10] and, therefore, there might not be a conflict between circuits. The district court in its decision granting recusal held that it had relied upon witness credibility (Fisher's) at the post-conviction hearing, whose credibility was now open to question by new evidence. Neither Judge Patterson or the Second Circuit, in light of *United States v. Levy*, *op cit.*, held that Fisher was credible and therefore the rejection of a hearing on this issue leads to only one conclusion, that the Second Circuit is in conflict with the 11th Circuit on this important, recurring issue.

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[10] The record shows that Fisher never denied such threats. He only testified that he did not remember "going that far," he "might have." It is not disputed by Fisher that Dr. Sprecher only agreed to a bench trial based upon Fisher's promise that Sprecher would testify in his own behalf.

The right of a criminal defendant to testify on his own behalf is, of course, at issue in every criminal case and this court ought to re-affirm the sanctity of this fundamental right by granting review in this case and establishing a bright-line rule.

CONCLUSION

For the reasons hereinabove set forth, the Petitioner respectfully submits that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

Stuart Jay Young
Counsel of Record
65-08 Austin Street
Rego Park, New York 11374
(718) 459-6601

Dated: Rego Park, New York
June 5, 1998

APPENDIX

UNITED STATES COURT OF APPEALS
FILED
MAR 12 1998
GEORGE LANGE III, CLERK
SECOND CIRCUIT/STAMP

UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

S U M M A R Y O R D E R

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of March, one thousand nine hundred and ninety-eight.

Present: HONORABLE RALPH K. WINTER,

Chief Judge,

HONORABLE FRED I. PARKER,

Circuit Judge,

HONORABLE WILLIAM W SCHWARZER,*

District Judge,

BENJAMIN G. SPRECHER,

Petitioner-Appellant,

- v. - No. 97-2366

UNITED STATES OF AMERICA,

Respondent-Appellee,

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*The Honorable William W Schwarzer, of the United States District Court for the Northern District of California, sitting by designation.

Appearing for Appellant: Sołomon Rosengarten, Rego Park, New York.

Appearing for Appellee: Lewis J. Liman, Assistant United States Attorney for the Southern District of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Patterson, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Benjamin H. Sprecher appeals from Judge Patterson's denial of his second petition brought pursuant to 28 U.S.C. S 2255 to vacate his conviction on a number of charges stemming from his involvement

in a conspiracy to commit securities fraud. Sprecher argues that the district court abused its discretion in denying his petition, and that he is entitled to relief under Section 2255 based on new "evidence" that: (I) the government knew that one of its witnesses was perjuring himself at trial; (ii) the government failed to disclose to the defense that witness's psychiatric history; (iii) Sprecher's lawyer provided Sprecher with ineffective assistance resulting from a conflict of interest; and (iv) the government engaged in a variety of activities constituting prosecutorial misconduct. We affirm for substantially the reasons stated by the district court. See Sprecher v. United States, No. 96 Civ. 1498, 1997 WL 154002 (S.D.N.Y. Apr. 2, 1997).

FOR THE COURT:
GEORGE LANGE, III, Clerk

Lucille Carter/Signature 3/12/98
By: Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENJAMIN SPRECHER,	
Petitioner,	96 Civ. 1498 (RPP)
- v -	**OPINION AND ORDER**
UNITED STATES OF AMERICA,	
Respondent.	

ROBERT P. PATTERSON, JR., U.S.D.J.

Benjamin G. Sprecher moves for a writ of habeas corpus pursuant to 28 U.S.C. 2255 to vacate his conviction and for a new trial or alternatively for discovery and an evidentiary hearing. The basis of the motion is that newly discovered evidence has been obtained which if previously available would have caused a different result both in Sprecher's trial and in his previous application for post-conviction relief. Petitioner's

Memorandum in Support at 1 (Pet. Mem. At 1).[1]

The facts underlying Sprecher's convictions for 1) conspiracy to defraud the United States and to sell unregistered securities, 2) making false statements to a government agency, 3) perjury, and 4) obstruction of justice are set forth in United States v. Sprecher, 783 F. Supp. 133 (S.D.N.Y. 1992), aff'd, 988 F.2d 318 (2d Cir. 1983). After a four-week trial, the trial court found that Sprecher was a central participant in conspiracies to defraud government agencies by use of publicly-held shell organizations and by his control over a not-for-profit corporation, Kahila Kadeshia Parkofski (KKP).

The proof at trial showed that, in December 1989 Sprecher reached an agreement with his law partner G.

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[1] The Memorandum of Law in Support of Petitioner's Application Pursuant to 28 U.S.C. § 2255 is hereinafter "Pet. Mem." Petitioner's Appendix of "newly discovered evidence" is hereinafter "App."

Alexander Novak and a client of Sprecher's, Louis S. Foti, to list KKP, a religious charity, as receiving a portion of the proceeds of a successful litigation initiated by Foti against Towers Financial Corporation ("Towers"); the proceeds were supposed to be divided among Foti, Novak, and Sprecher, but for tax reasons the three arranged to use the tax-identification number of KKP to be used for the account into which the proceeds of the litigation were paid; and that thereafter Sprecher laundered the proceeds through a KKP account at Bank Leumi in Jerusalem and then distributed Novak's and Foti's shares of the proceeds to them from the KKP Jerusalem account. U.S. v. Sprecher, 783 F. Supp. 133, 139-42 (S.D.N.Y. 1992). The trial judge found Sprecher to be guilty of conspiracy to defraud the government in violation of 18 U.S.C. § 371, and of making a false statement to a United States agency in violation of 18 U.S.C. § 1001. Sprecher, 783 F. Supp. at 156-58.

The proof at trial also showed that Sprecher and Foti collaborated on a plan to sell unregistered shares in a shell corporation World Wide Medical Technology ("World Wide") to members of the public in violation of the securities laws. In this connection they determined to provide evidence to the SEC that Jacob Roth, a business associate and client of Sprecher's, was no longer in control of World Wide with the aim of making shares of World Wide eligible for sale to the public. To effectuate this purpose, Sprecher, Foti, and Hastings, a friend of Foti's met on March 30, 1988 to elect retroactively new directors and officers of World Wide and to create and backdate false minutes of a meeting of the Board of Directors of World Wide. Sprecher backdated the minutes to December 15, 1987 and sent them to the SEC on April 21, 1988 with and SEC Form 8K falsely reporting the change in control on December 16, 1987 and a cover letter falsely stating that these enclosures had been previously mailed to

the SEC but had been returned to Sprecher because the label on the envelope "got torn in the mail." See 783 F. Supp. at 142-48.[2] The trial court thus found Sprecher to be guilty of 1) one count of conspiracy to sell unregistered securities in violation of 15 U.S.C. §§ 77e and x and to make false statements to a government agency in violation of 18 U.S.C. § 1001, and 2) four counts of making false statements to a government agency in violation of 18 U.S.C. § 1001. 783 F. Supp. at 160-61.

At trial it was also established that Sprecher committed perjury in violation of 18 U.S.C. § 1621, and engaged in obstruction of justice in violation of 18

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[2] Sprecher also sent the SEC two SEC Forms 10Q for the quarters ended February 29, 1988 and May 31, 1988, respectively falsely reporting the change of control of World Wide as a result of the December 16, 1987 board of directors meeting.. These forms demonstrate that Sprecher believed that the elapsing of a three month period was required for such eligibility, contrary to the petitioner's statements in his memorandum in support. (Pet. Mem. at 4.)

U.S.C. § 1505 while testifying on May 1 and 2, 1985 in a deposition under oath, before the SEC in an SEC investigatory matter 783 F. Supp. at 161-64.

It was also proven that in 1989, after the SEC had subpoenaed records of KKP and NAV-AIR Industries Ltd. ("NAV AIR"), also controlled by Sprecher, Sprecher filed a lawsuit to quash those subpoenas in the United States District Court for the District of Utah and filed an affidavit with that court in which he falsely stated that his relationship to KKP and NAV AIR was limited to an attorney-client relationship. The trial judge thus found Sprecher guilty of obstruction of justice, 18 U.S.C. § 1503. 783 F. Supp. at 153-54.

In sum the trial judge found the defendant guilty of one count of conspiracy to defraud the United States, one count of conspiracy to sell unregistered securities and to make false statements, five counts of making a false statement to a United States Agency, one

count of perjury, and two counts of obstruction of justice. Sprecher retained new counsel and filed an appeal to the Second Circuit, which affirmed the convictions, but remanded for resentencing. United States v. Sprecher, 988 F.2d 318 (2d Cir. 1993).

Sprecher filed various post-conviction motions on March 24, 1993 and April 11, 1993, which the trial judge treated as motions pursuant to 28 U.S.C. § 2255,[3] and held an evidentiary hearing, after which the motions were denied in their entirety. United States v. Sprecher, No. (S3) 90 Cr. 234 (MGC), 1994 WL 115998 (S.D.N.Y. March 29, 1994, aff'd,

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[3] Although petitioner takes the position that this proceeding constitutes his first § 2255 motion, Sprecher's prior application was, in substance, a motion brought under 28 U.S.C. § 2255, as correctly determined by the district court in the first proceeding. Indeed, Sprecher's Petition for Writ of Certiorari repeatedly refers to his prior application as a § 2255 Petition. (See App. at 109.)

50 F.3d 3 (2d Cir.), cert. Denied, 133 L.Ed.2d 205 (1995).

Having exhausted those appeals, Sprecher filed this second § 2255 petition in March 1996 and moved to disqualify Judge Cedarbaum pursuant to 28 U.S.C. § 455(a) (1994). On October 3, 1996 the trial judge, finding that at this point her impartiality "might reasonably be questioned," disqualified herself. The petition was reassigned to this Judge on October 11, 1996.

In this petition Petitioner seeks to have his conviction vacated or, alternatively, a hearing with discovery and testimony. (Pet. Mem. at 1.) His claim of newly discovered evidence is 1) that his trial counsel, Ivan Fisher, rendered ineffective assistance of counsel and had a conflict of interest, 2) that Foti committed perjury and lacked credibility, and 3) that the government engaged in misconduct during the trial.

1. Ineffective assistance of counsel

As to petitioner's first argument, Sprecher asserts that he is presenting newly available evidence with respect to his trial counsel's conflict of interest. Petitioner's counsel on appeal, after full review of the record, did not claim ineffective assistance by Mr. Fisher. The issue was raised, however, by petitioner in his previous § 2255 application and rejected on the merits after an evidentiary hearing, as well as procedurally. No new grounds are asserted here under Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Court.

Sprecher contends that United States v. Levy, 25 F.3d 146 (2d Cir. 1994), reversing a conviction on account of actual conflicts of interest of defendant's counsel (also Fisher), represents new law, (Pet. Mem. at 17), and is directly relevant to Fisher's alleged conflict of interest during the time petitioner was represented by Fisher. The Second Circuit, however, in affirming the

District Court's denial of Sprecher's first petition, expressly considered Levy, but found that Fisher had only a potential not an actual conflict and that, based on the trial court's findings, the potential conflict had resulted in no prejudice to Sprecher during Fisher's representation. In this proceeding Sprecher also fails to show that Fisher suffered from an actual conflict of interest as found in Levy. In Levy, the Circuit Court found 1) Fisher faced possible prosecution by the same prosecutor's office; 2) Fisher was also representing a co-defendant who had fled; 3) Fisher was suspected of aiding the co-defendant's flight; and 4) Fisher was a possible witness. Levy, F.3d at 156-57.

On November 29, 1989 Fisher pleaded guilty to three criminal tax charges and was placed on probation for eighteen months by the District Court for the Eastern District of New York on November 29, 1989. (App. at 166.) A condition of Fisher's probation was that he file and pay federal, state and local taxes.

Sprecher argues that Fisher had violated this term of his probation and thus had an actual conflict at the time of his representation of Sprecher.[4] In his prior 2255 proceeding Sprecher raised the issue of Fisher's conflict and after a hearing Judge Cedarbaum determined that prior to his trial Sprecher had been made aware of Fisher's legal difficulties and found Fisher's testimony that he had explained his legal difficulties to Sprecher several times to be extremely credible and that the corroborative testimony of Novak,

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[4] Although the records of the District Court for the Eastern District of New York are available for inspection and copying, petitioner offers no document showing that Fisher was ever charged with violating his probation. Instead he relies on an undated news article reporting Fisher's failure to pay the city's unincorporated business taxes. (See App. at 168.) Nor does Sprecher's citation to a news article as newly discovered evidence that Fisher was delinquent in paying unincorporated business taxes create an actual conflict of interest since there is no showing it occurred within the period of probation, which by its terms stopped in June 1991, well prior to the trial.

Sprecher's erstwhile partner and defense witness, was extremely credible. United States v. Sprecher, 1994 WL 115998 * 2 (S.D.N.Y. 1994.) The Second Circuit rejected Sprecher's argument about Fisher's conflict of interest due to his November 1989 conviction because it found that since "Fisher's sentencing in the Eastern District was completed before he was retained by Sprecher, Fisher could not have reasonably believed he had an interest in tempering Sprecher's defense in order to curry favor with the prosecution." (App. at 133); see Levy, 25 F.3d at 155. It also found that Sprecher had not shown prejudice resulting from Fisher's representation of Sprecher, particularly in view of the District Court finding that Fisher was an intelligent and diligent advocate for Sprecher and that he repeatedly challenged the government. The Circuit concluded that there was no basis for finding that Sprecher might have been acquitted had Fisher not been faced with potential conflicts. Accordingly,

Sprecher's claims here are barred because he failed to raise the point on his appeal and because he raised them unsuccessfully in his first Section 2255 petition. Williams v. United States, 731 F.2d 138, at 141, 142 (2d Cir. 1984.) That Fisher may not have paid his unincorporated business taxes to the City, even if true, would not reasonably have caused Fisher to believe "he had an interest in tempering Sprecher's defense in order to curry favor with the prosecution."

2. Foti's perjury

Petitioner's second claim, that Louis Foti's testimony was perjurious at petitioner's trial, is based on the following new evidence 1) that at Foti's sentencing on December 21, 1995, it was disclosed that Foti had "severe mental problems," suffered from hypertension, and was a manic depressive, (App. at 170-73); 2) that claims in a litigation were commenced against Foti and Sprecher and John and Agnes Wells in August 1993; and 3) that letters from William McLucas of

the SEC stated that Foti was arrested in Salt Lake City on March 1, 1990.

Petitioner's contention that Foti's sentencing is new evidence that Foti perjured himself is meritless. The sentencing Judge's consideration of Foti'S hypertension and manic depression, (see Foti Sentencing Tr., App. at 173), raises no serious question as to whether or not Foti perjured himself at trial. The fact that Foti's attorney acknowledged that Foti engaged in "deceiving people" and "going from one high - the high being a deal, a scam, a stock issue - to another" is consistent with Foti's testimony at trial. As described by Judge Cedarbaum in her March 29, 1994 opinion, "Foti admitted to an extensive history as a "'con man' who specialized in security swindles." U.S. v. Sprecher, 1994 WL 115998 *5 (S.D.N.Y. 1994.) Counsel's suggestion, citing U.S. v. Sullivan, 595 F.2d 7 (9th Cir. 1979), that if Foti had gone to trial he might have been found innocent due to his condition is not supported in any way

by the excerpts of Foti's sentencing contained in petitioner's appendix. Judge Cedarbaum's Findings of Fact and Conclusions of Law of January 1992 make it abundantly clear that in making those findings, she relied on the NAGRA tape recording of Sprecher, Hastings, Foti meeting on March 30, 1991, which clearly demonstrated that Sprecher was engaged in creating a December 15, 1989 meeting of directors of World Wide, and not on Foti's or Hasting's testimony at trial. U.S. v. Sprecher, 783 F. Supp. 133, 143 (S.D.N.Y. 1992.)

Based on the statement that Foti was arrested in Utah on March 1, 1990, contained in letters from William McLucas, SEC Director of Enforcement, to New York's two senators, summarizing the case against one of Sprecher's collaborators, (App. at 187, 189), Sprecher argues that Foti perjured himself at trial in testifying that he was not arrested in Utah on March 1, 1990. This issue was raised in Sprecher's first § 2255 application and

was correctly denied by Judge Cedarbaum. Although McLucas made such statements, he did not conduct or make "the arrest," nor did his agency. Thus, McLucas had no personal knowledge to support the statements contained in his letters. Foti was apprehended by FBI agent David Maclean on March 1, 1990 in Utah: The FBI report (App. at 193-200) contains no statement that Foti was arrested. Although the FBI report does indicate that Foti was given an "FD 395-Interrogation; Advice of Rights Form" and was orally advised of his rights, that does not require the conclusion that Foti was arrested on that date. It is not an uncommon procedure for an agent not to arrest a suspect if the agent does not wish the subject's apprehension to be publicly known and if the agent wishes to use the suspect in an undercover capacity as was done here.

Lastly, Sprecher contends that new evidence exists in the form of the 1993 complaint in the John and Agnes Wells litigation which sets forth allegations as

to their ownership of Towers stock in 1983. Sprecher responded to this complaint in October 1993 and has failed to show why he failed to raise this issue at the hearing during his first § 2255 application.[5] The claim is procedurally barred. Rules Governing Section 2255 Proceedings for the United States District Courts 9(b).

3. Government misconduct

Petitioner's claims in his supporting memorandum of law and reply memorandum are largely based on hearsay, innuendo, and conclusions of fact, and are not based on evidence. He makes charges of perjury and suppression of evidence against prosecuting attorneys and government agents without providing any evidence that any perjury or suppression occurred: Instead he relies on speculation. In his prior § 2255 proceeding, Judge Cedarbaum,

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[5] Nor has he shown why he did not list the Wells as uncalled witnesses in his 1993 § 2255 motion, which Judge Cedarbaum denied in 1994. Lastly, he relies on hearsay as to Foti's reaction to the plaintiffs' claims.

after a careful review of the evidence, found that neither a tape recording of Foti's debriefing by Maclean or a written cooperation agreement with the authorities in the state of Utah ever existed. United States v. Sprecher, 1994 WL 115998 * 5 (S.D.N.Y. 1994). Sprecher offers no evidence in this proceeding that such a recording or agreement existed.

Sprecher also argues that because the FBI in Salt Lake City obtained authorization for consensual audio recordings and closed-circuit TV in December 1989 based on its interest in his activities with certain other individuals in its Incwell investigation, (App. at 28-51), that the FBI recorded a meeting he had in his offices with Foti and Messrs. Barney and Rupp on January 4, 1990. Petitioner makes this claim although there was filed in a past prosecution for securities fraud involving New Minority Ventures in the United States District Court in Utah an affidavit by an FBI agent Healy, not a member of the Sprecher

prosecution group, that Barney and Rupp were cooperating witnesses of the FBI not acting for the FBI but engaged in attempting to obtain financing for their private business at the time of such meeting. Sprecher's claim is also inconsistent with the FBI reports which Sprecher obtained through FAIA requests which indicate that the investigation into Sprecher's involvement with New Minority Ventures, Inc. was initiated on January 10, 1990, six days after the purported meeting. (App. at 49.)

Sprecher also argues that in pre-trial discovery the government suppressed FBI requests for authorization to make consensual recordings although he makes no showing that such documents contain any statement by Sprecher or any witness or could be deemed impeachment material or contained any exculpatory information. Thus Sprecher has not shown how this alleged suppression could have made any difference in the outcome of his trial.

Lastly, Sprecher presents a letter from NASD dated September 19, 1995, which states that Caryl Bernard's NASD registration was revoked on April 24, 1989 for nonpayment of fines and or costs. (App. at 257-58.) There is no showing however that Bernard was aware of the revocation. At trial Bernard stated that she had never received any such notification as she had left the securities business, and any notice was not sent to the proper address. 1994 WL 115998 * 5. Nor is there any showing that the government suppressed information about the NASD registration. The government submitted an excerpt of records of NASD discipline about Bernard which indicated she was permitted to resign. (App. at 255-56.) In any event the discrepancy Sprecher points to is not significant and is deemed entirely immaterial to the evidence upon which Sprecher was convicted. There is no "reasonable probability that had this evidence been disclosed to the defense the

outcome of the proceedings would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The evidence presented by this petition does not put the case "in such a different light as to undermine the confidence in the verdict." Kyles v. Whitley, 115 S.Ct. 1555, 1566 (1995).

Conclusion

For the foregoing reasons, the petition is denied with prejudice. The Court declines to issue a certificate of appealability as no substantial constitutional issue has been raised.

IT IS SO ORDERED.

Dated: New York, New York
April 1, 1997

Robert P. Patterson, Jr./signature
Robert P. Patterson, Jr.,
U.S.D.J.

Copies of this Opinion and Order sent to:

Stuart Jay Young, Esq.
65-08 Austin Street
Rego Park, New York 11374
Tel: (718) 459-6601
Fax: (718) 459-6564

Mary Jo White
United States Attorney
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
Attn: Lewis J. Liman
Tel: (212) 791-1968